

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JIMMIE R. BLACK,
appellant,

v.

DEPARTMENT OF THE AIR FORCE,
agency,

DOCKET NUMBER
AT07528510244

DATE: SEP 17 1985

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

The agency petitions for review of an initial decision of the Board's Atlanta Regional Office which mitigated appellant's removal from the position of Meatcutter Foreman, WS-8, to a demotion to a nonsupervisory position. The petition is hereby GRANTED. 5 U.S.C. § 7701(e)(1).

BACKGROUND

Appellant was removed from the position of Meatcutter Foreman at Maxwell Air Force Base in Montgomery, Alabama, effective December 21, 1984, based on charges of deliberate falsification of official documents, deliberate falsification or concealment of material facts in connection with an

official investigation, and wanton disregard of agency directives regarding meat pricing.

On appeal to the Board's Atlanta Regional Office, the presiding official issued an initial decision based upon the documentary evidence submitted by the parties.^{1/} In that decision, the presiding official evaluated the first charge of deliberate falsification of official documents and found that only one of three specifications was sustainable. Specifically, she found that appellant falsified the March, 1984 meat inventory by adding an entry of \$3,715.47, ^{2/} but that the agency failed to prove by preponderant evidence the two specifications alleging that appellant asked subordinates to sign forms attesting to meat cutting tests that were never performed. With respect to the second charge, the presiding official determined that the agency proved by preponderant evidence that appellant deliberately concealed material facts in connection with an agency investigation, as charged. Finally, the presiding official found that the charge of wanton disregard of agency directives regarding meat pricing was not sustainable because appellant raised the prices on order from a superior, and the agency considered the superior, who received a reprimand at the time, to be the culpable party.

As a result of her finding that not all of the charges were sustainable, the presiding official considered whether the sustained charges warranted the penalty imposed, and concluded that they did not. She therefore mitigated the

^{1/} Appellant did not request a hearing. See 5 C.F.R. § 1201.57(b).

^{2/} Appellant apparently padded the inventory by \$5,995.47, but because the purchaser actually picked up \$2,280.00 worth of meat by the end of March, the agency conceded that the actual falsification was in the amount of \$3,715.47.

penalty of removal to a demotion because: 1) appellant's superior ordered him to falsify the meat inventory, and appellant did not benefit from the act; 2) although appellant concealed information during the investigation he eventually made a full disclosure; and 3) appellant had an unblemished twelve-year disciplinary record with the agency.

In its petition for review of the initial decision, the agency contends that: 1) the evidence of record supports the specification concerning falsification of meat cutting tests; 2) the evidence of record supports the charge of excessive pricing in violation of agency directives; and 3) mitigation was inappropriate.

ANALYSIS

With respect to the agency's first contention, the presiding official determined that the Office of Special Investigations' (OSI) report, Agency file, Tab 13a, constituted uncorroborated hearsay evidence, unsigned by the author, and therefore discounted its probative value. Initial Decision (I.D.) at 3. Additionally, she found that because Mr. Townsend's affidavit was not consistent with his earlier, less conclusive testimony in the OSI report, his testimony was of questionable reliability.^{3/}

We have reviewed the record and find no inconsistency between Mr. Townsend's affidavit of March, 1985, which clearly implicates appellant, and the information provided in the OSI report of August, 1984. Although the presiding official stated that in the OSI excerpt Mr. Townsend "named no persons", his statement was provided in response to a request for information concerning appellant. The only

^{3/} The agency challenged the presiding official's statement that the agency failed to provide the original affidavits of Mr. Townsend and Mr. Powe, the meatcutters whose interviews were extracted by the OSI and used to support the agency's charge that appellant falsified meat cutting tests. Even if the presiding official erred in assuming that affidavits were provided pursuant to the initial interviews, the agency has not shown that such error was prejudicial to its substantive rights. See Karapinka v. Department of Energy, 6 MSPB 114 (1981).

information in opposition to the substantiation provided by the OSI report and Mr. Townsend's affidavit is appellant's uncorroborated blanket denial of the incidents. In view of the fact that appellant initially denied personally falsifying inventory figures, a denial that was ultimately retracted, we find that appellant's denial that he instructed subordinates to do so lacks credibility. Mr. Townsend's affidavit, however, is a declaration against his own interest, in that he admits to signing meat cutting tests without performing them. We find, therefore, that the agency has proved by preponderant evidence that appellant falsified meat cutting tests as charged.

The presiding official determined that appellant did not wantonly disregard agency directives with respect to excessive pricing, based on her finding that the charge was "resurrected and included as a basis for appellant's proposed removal," I.D. at 4, despite the agency's treatment of appellant's supervisor as the culpable party in an earlier proceeding.^{4/} The record, however, contains no evidence that the agency had reason to believe that appellant might have been subject to the same charge, prior to the revelations provided as a result of the OSI investigation. The deciding official, Mr. Noah Poe, confirms this in his affidavit where he states:

Furthermore, while it is true that Mr. Whitby received a written reprimand at the time. . .there was no knowledge of the serious shortages in the Maxwell commissary. . . . Once all the facts came out, Mr. Whitby was relieved of his duty as Store Manager and later served with a Notice of Proposed Removal. After that, adverse action was then brought against Mr. Black as well, based upon all matters of his misconduct, including his wrongful meat price increases.

Official file, Tab 7 at 4.

^{4/} In a statement of June 7, 1984, appellant admitted to manipulating meat prices at the behest of his supervisor. Agency file, Tab 13c.

We find, therefore, that the agency proved by preponderant evidence that appellant improperly manipulated meat prices in violation of agency directives.

The presiding official based her decision to mitigate on the circumstances under which appellant falsified the inventory, his lack of personal gain from the falsification, the fact that he ultimately revealed the material facts he initially concealed, his years of unblemished service, and the agency's failure to prove all the charges. I.D. at 6. For the reasons set forth below, we do not find that these considerations warrant mitigation of the agency's decision to remove appellant.

The Board has recognized a number of factors that are relevant for consideration in determining the appropriateness of a penalty. See Douglas v. Veterans Administration, 5 MSPB 313, 313-332 (1981). The pertinent factors in the present case are: 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed for gain; 2) the employee's job level; 3) the employee's work record; 4) the effect upon supervisors' confidence in the employee's ability to perform assigned duties; 5) consistency of the penalty with those imposed upon other employees for the same or similar offenses; and 6) the notoriety of the offense or its impact upon the agency's reputation.

In the instant case, appellant intentionally falsified the meat inventory, albeit at his supervisor's behest. Although the presiding official determined that appellant did not act for personal gain, his actions inured to his personal benefit in that he gained favor with his supervisor and bolstered his own managerial reputation. Clearly, intentional falsification of a government record in the amount of \$3,715.47 is a serious offense under these - or any - circumstances.

Although the presiding official noted that holding a supervisory position alone should not dictate the penalty in this case, the record indicates that appellant was a supervisor in the meat department, the locus of appellant's misconduct. As meat market manager, appellant was responsible for detecting and correcting irregularities in his department. Appellant's supervisory position, with its substantial requirements of responsibility and trust, must be considered an aggravating factor under these circumstances. See e.g., DeDonato v. U.S. Postal Service, 25 M.S.P.R. 286, 292 (1984).

Appellant's flawless twelve-year work record weighs in his favor. We find, however, that this mitigating factor is outweighed by the numerous aggravating factors discussed herein.

Despite a letter in the record from one of appellant's subordinates, attesting to appellant's honesty and business-like manner, Agency file, Tab 7d, both the proposing and deciding officials in the case attested to their loss of confidence and trust in appellant. Agency file, Tab 6; Agency file, Tab 9. Further, the deciding official stated "[t]he removal of Mr. Black is exactly consistent with the adverse actions imposed on all other supervisory offenders involved in the Maxwell Commissary investigation." Official file, Tab 7 (emphasis supplied). Finally, the deciding official stated that the Maxwell commissary investigation received wide-spread media coverage and that the mission of the commissary to provide food and merchandise at the lowest possible price was hampered by appellant's misconduct.

We find, based on the foregoing, that the agency-imposed penalty of removal was within the limits of reasonableness based on the sustained charges and the aggravating factors outlined above. See Douglas, supra.

Accordingly, the initial decision is hereby AFFIRMED as MODIFIED and the removal is SUSTAINED, based on our finding that the charges are supported by preponderant evidence and

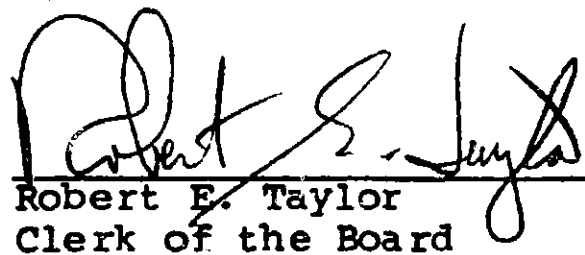
that the penalty of removal is within the limits of reasonableness.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board